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JUL 30 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

July 30, 1993

Mr. William F. Caton  
Acting Secretary - Stop Code 1170  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554

Re: MM Docket 93-155

Dear Mr. Caton:

Transmitted herewith on behalf of Richard P. Bott, II, are an original and six copies of its "Opposition to Petition to

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

**RECEIVED****JUL 30 1993**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of	)	MM Docket 93-155
	)	
<b>RICHARD BOTT II</b>	)	File No. BAPH-920917GO
(Assignor)	)	
	)	
and	)	
	)	
<b>WESTERN COMMUNICATIONS, INC.</b>	)	
(Assignee)	)	
	)	
For Assignment of Construction	)	
Permit of Station KCVI (FM),	)	
Blackfoot, Idaho	)	

TO: The Honorable Arthur I. Steinberg

**OPPOSITION TO PETITION TO INTERVENE**

Richard P. Pott, II, by his attorneys, hereby opposes the July 21, 1993 Petition to Intervene ("Petition") filed by Radio Representatives, Inc. ("RRI") in the above-captioned proceeding. In support the following is respectfully stated:

**I. RRI PETITION SHOULD BE DISMISSED**

1. RRI relied upon an improper remedy to deal with the fact that it was not made a party to this proceeding. RRI's standing to file a petition to deny was fully considered by the Commission, and found to be lacking in the Hearing Designation Order, FCC 93-290, released June 15, 1993 ("HDO"). HDO. ¶8. In light of this

2. Even if a petition for intervention were an appropriate remedy, RRI has failed to meet the requirements of Section 1.223(b). Section 1.223(b) of the Commission's rules provides that the petition of a party seeking to intervene as a party in any proceeding must establish the interest of the petitioner (or standing) and must establish how the petitioner's participation in

affirmed the grant of the Blackfoot construction permit to Bott.<sup>1</sup> The Commission has consistently held that a former applicant for a particular facility is not a party in interest in, and will not be permitted to intervene in a proceeding, involving another application for the facility. Kenneth J. Crosthwait, 47 R.R. 2d 1249 (1980).<sup>2</sup>

4. Moreover, in the HDO, Commission stated that it found "no basis to grant RRI standing to file a petition to deny." Id. at ¶8. Since the standards for establishing standing to file a petition to deny and for intervening are the same,<sup>3</sup> and since the Commission expressly found that RRI lacked standing to petition to deny Bott's application, RRI similarly lacks standing to intervene in this proceeding.

5. RRI also fails to establish that its participation in the proceeding would assist the Commission in the determination of the hearing issues as required by Section 1.223(b). In an attempt to establish compliance with this prerequisite, RRI baldly concludes, without factual basis, that it is "uniquely well qualified as a competing applicant to assess critically and knowledgeably the

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<sup>1</sup> Even assuming arguendo that the Commission holds that Bott misrepresented or lacked candor regarding his integration commitment and also revokes Bott's construction permit, RRI still has no interest in this proceeding. RRI need not participate in this proceeding in order to refile its petition for recall in the event of an adverse finding against Bott in this proceeding.

<sup>2</sup> See also, *Denton FM Radio, Ltd.*, 56 R.R.2d 171 (Rev. Bd. 1984).

<sup>3</sup> *Radio Lares*, 40 R.R.2d 35, 37 (1977). See also, *Juarez Communications Corp.*, 56 R.R.2d 961 (Rev. Bd. 1991).

misrepresentation and lack of candor issues" (Petition, p.2-3) and to assist the Commission in the "adjudication and resolution" of the issues (*Id.*, p. 4). The Commission expressly rejected familiarity with the facts of a case through participation in a comparative hearing as a basis for establishing that a petitioner's participation would assist the Commission in the resolution of the hearing issues. See *Kenneth J. Crosthwait, supra*, at 1252.

6. RRI is no longer an applicant in competition with Bott, the proceeding in which it was Bott's competitor having been finally determined. *HDO*, ¶ 8. Furthermore, RRI has not shown that it has any factual evidence uniquely within its control necessary to develop a full and complete record to properly resolve the hearing issues.<sup>4</sup> RRI has not shown how its intervention would illuminate the issues in ways that could not be accomplished if it were not a party.<sup>5</sup> RRI's adversarial, argumentative interpretation

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<sup>4</sup> RRI's reference to its "engineering studies" (Petition, p. 2) does not identify such factual evidence. The Mass Media Bureau may offer as evidence those studies, which are a part of the record of this proceeding, just as the Bureau may offer any other evidence it believes relevant to the designated issues. RRI, like any

of the comparative hearing record and Bott's November, 1992 declaration can provide no meaningful assistance in the determination of the issues in this proceeding, which must be determined on the basis of facts. Finally, it is the Presiding Judge, acting upon delegated authority for the Commission, not RRI, who must "assess critically" the issues and the evidence presented in this proceeding.<sup>6</sup>

#### CONCLUSION

In seeking intervention under Section 1.223(b) RRI has sought the wrong remedy. A Petition for Reconsideration of the HDO pursuant to Section 1.106(a)(1) of the rules was the proper means to redress the fact that it was affirmatively found not to have standing to be a party. RRI's remedy under Section 1.106(a)(1) has now been foreclosed by the passage of time.

Moreover, RRI has failed to establish that it is a party in interest in this proceeding for purposes of intervention. Similarly, RRI has failed to establish how its participation will assist the Commission in the determination of the issues pending against Bott. Absent these required showings, intervention under

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(U.S. App. D.C. 1984).

<sup>6</sup>Clearly, the issues sought by RRI in its Petition emphasize RRI's motivation in seeking intervention; namely, its own private interest in obtaining the Blackfoot construction permit, rather than the defense of the public interest. RRI has failed to establish the relevance of its proposed issues to the proceeding described in the HDO. RRI's argument that even if the presently designated issues are decided in favor of Bott, the Commission should reconsider the prudence of having awarded Bott integration credit is no more than an attempt to retry the comparative case from square one.


Section 1.223(b) must be denied.

WHEREFORE in light of the foregoing, Richard P. Bott, II respectfully submits that the petition of Radio Representatives, Inc. to intervene in the proceeding regarding the application for assignment of Richard P. Bott, II's Blackfoot, Idaho construction permit to Western Communications, Inc. must be dismissed or denied.

Respectfully submitted

RICHARD P. BOTT, II

By

  
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July 30, 1993

**CERTIFICATE OF SERVICE**

I, Diane Roper, a secretary in the law office of Fletcher, Heald & Hildreth, hereby certify that I have on this 30th day of July, 1993, had copies of the foregoing "OPPOSITION TO PETITION TO INTERVENE" mailed by U.S. Mail first class, postage prepaid, to the following:

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